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ASSOCIATION OF
AMERICAN RAILROADS

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June 29, 2009

Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: STB Ex Parte No. 690, Twenty-Five Years of Rail Banking: A Review and Look Ahead

NOTICE OF INTENT TO PARTICIPATE

Dear Acting Secretary Quinlan:

Pursuant to the Notice served by the Board on May 21, 2009 in the above proceeding, the Association of American Railroads ("AAR") hereby submits its Notice of Intent to Participate and appear at the hearing in the proceeding on July 8, 2009.

The AAR will be represented by Edward R. Hamberger, its President and Chief Executive Officer. A time of five minutes is requested for the AAR's oral testimony. Attached is a copy of the AAR's Written Testimony.

If the Board establishes panels of witnesses for the hearing, the AAR requests that it be placed on a panel with other railroads that will be appearing.

Respectfully submitted,

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 690

TWENTY-FIVE YEARS OF RAIL BANKING: A REVIEW AND LOOK AHEAD

WRITTEN TESTIMONY OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Introduction

By Notice served May 21, 2009, the Surface Transportation Board ("Board") scheduled a public hearing for July 8, 2009 "to examine the impact, effectiveness, and future of rail banking under Section 8 (d) of the National Trails System Act." Notice at 1.[1] In its Notice, the Board stated that it has issued numerous decisions under the rail banking program authorizing interim trail use negotiation periods (many of which have resulted in interim trail use agreements) and that to date the Board has authorized nine rail banked lines for the restoration of rail service. Id. at 2. The Board also noted that it

[1] Section 8(d) of the National Trails System Act, codified at 16 U.S.C. §1247 (d), provides the statutory basis for voluntary arrangements between a carrier and a trail sponsor that enables a railroad corridor that would otherwise be abandoned to remain intact and available for future active rail service ("rail banking") while permitting it to be used in the interim as a recreational trail.

has been faced in recent years with an increasing number of formal and informal inquiries about various aspects of the rail banking program. Id. The Notice set forth several specific issues that the Board proposed for discussion and also invited parties to comment "on the rail banking program in general and the future of rail banking in an era of constrained rail infrastructure." Id.

The Association of American Railroads ("AAR") welcomes the opportunity to participate in the July 8, 2009 public hearing regarding the rail banking program and hereby submits its written testimony on behalf of its member freight railroads.[2] The AAR believes that the rail banking program as administered by the Board effectively implements Congress' objectives in enacting Section 8(d) of the National Trails System Act ("Trails Act"), and the program enjoys railroad support and participation. The AAR's testimony will address those issues of import to its members in the Board's Notice.

Background

I. Section 8(d) of the Trails Act: The Rails-to-Trails Provisions

In the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act")[3], Congress noted its concern about the loss of rail corridors through abandonments and its interest in preserving former rail corridors intact for future use. The 4-R Act attempted to address this concern through various provisions aimed at promoting the "banking" of these lines for potential future rail use and the interim conversion of abandoned lines to trails or other public uses.[4]

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[2] The AAR's members account for 75 percent of U.S. freight mileage, 92 percent of employees, and 95 percent of revenues. Individual AAR members may also submit written testimony and participate in the July 8, 2009 hearing.

[3] Pub. L. 94-210, 90 stat. 144.

[4] See *Presault v. I.C.C.*, 494 U.S. 1, 6 (1990) ("*Presault*").

The provisions of the 4-R Act proved unsuccessful in achieving Congress' objectives. A principal obstacle to achieving such objectives was the possible reversion of railroad rights-of-way once an abandonment was authorized and consummated. Because many railroad rights-of -way are not owned by the railroads in fee, but rather are easements pursuant to which the property reverts to the abutting landowner upon termination of rail use, state law reversionary rights precluded preservation of the former rail corridor by conversion to trail use.[5]

The rails-to-trails act provisions were enacted in 1983 as amendments to the Trails Act to address the state law reversionary interests arising from approved abandonments. The rails-to-trails provisions addressed this problem by permitting rail carriers to negotiate voluntary interim trail use agreements with entities prepared to assume financial and managerial responsibility and legal liability for the right-of-way. As a result, if the parties reach agreement, the land may be transferred to the trail operator for interim trail use; if no agreement is reached, the line may be abandoned by the carrier. The interim trail use is subject to future reactivation of the corridor to rail use. Where there is an agreement for interim trail use, the Trails Act expressly overrides any reversionary rights. [6]

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[5] See H.R. Rep. No. 98-28 at 8-9. A carrier cannot abandon a rail line without authorization from the Board pursuant to 49 U.S.C. 10903 or under the exemption provisions of 49 U.S.C. 10502. (Comparable provisions governed abandonments under the jurisdiction of the Board's predecessor agency, the Interstate Commerce Commission ("ICC").) Once a carrier obtains abandonment authorization from the Board and consummates the abandonment, Board jurisdiction over the abandoned line terminates. Thus, the result of an agency-authorized abandonment in many cases was the loss of an assembled rail corridor as the various parcels comprising the corridor reverted to others, or were sold if owned by the railroad.

[6] Under the Trails Act, rail carriers can transfer lines to interim trail sponsors by means of donation, lease, sale or otherwise. 16 U.S.C. 1247 (d). As provided by Section 8 (d) of the Trails Act, "such interim use shall not be treated, for purpose of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." Section 8(d) was upheld in *Presault* against constitutional challenge. The Court further found that a Tucker Act remedy was available for any reversionary property owner asserting a taking claim under Section 8 (d). *Presault,* 494 U.S. at 4-5, 11-12.

II. The Board's Regulations Implementing the Trails Act Provisions

The Board's regulations implementing the Trails Act are intended to facilitate the voluntary negotiation of interim trail agreements between an abandoning carrier and a trail sponsor. Such regulations minimize procedural burdens and recognize the Board's ministerial role in facilitating the negotiation process.[7]

Under the Board's implementing regulations, potential trail operators (and other interested parties) are provided public notice of abandonment and abandonment exemption proceedings through Federal Register notice, local newspaper publication and other means. The notice includes a statement inviting comment on prospective use of the right-of-way for interim trail use and rail banking.[8] Potential interim trail use sponsors interested in acquiring or using the line for interim trail use must file (within specified time periods)[9] a statement of willingness to assume financial and managerial responsibility for the right-of-way proposed to be acquired. The statement must include an acknowledgement that the line is subject to possible future reconstruction and reactivation for rail service. [10]

At that point, the role of the Board is to "determine whether the Trails Act is applicable," i.e., that the potential trail user has complied with the procedural requirements of 49 C.F.R. §1152.29 and has executed a statement of willingness to assume financial and managerial responsibility.[11] If so, the Board requests the carrier to

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[7] See *Rail Abandonments –Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591, 605 (1986); *Policy Statement on Rails-to-Trails Conversions*, 1990 WL 287255 (I.C.C.) *3-4 (February 6, 1990).
[8] See 49 U.S.C. §10903(a) (3) (c); 49 C.F.R. §§ 1105.12, 1152.20; 49 C.F.R. §1152.21 (5) (vi).
[9] See 49 C.F.R. §§1152.29 (b) (1)-(2) (within the 30-day comment period in regulated abandonments and within 10 days after Federal Register notice in exemption proceedings).
[10] 49 C.F.R. §1152.29 (a).
[11] See *Rail Abandonments –Use of Rights-of-Way as Trails*, 4 I.C.C. 2d 152, 156 (1987); *Policy Statement on Rails-to-Trails Conversions*, 1990 WL 287255 (I.C.C.) *3 (February 6, 1990).

state whether it intends to negotiate an interim trail use agreement.[12] If the carrier is willing to negotiate an interim trail use agreement, the Board issues a Certificate of Interim Trail Use or Abandonment (CITU) (in an abandonment proceeding) or a Notice of Interim Trail Use or Abandonment (NITU) (in an exemption case) to allow the parties time to negotiate an agreement. A CITU or NITU provides a 180-day period during which the railroad may discontinue service, cancel tariffs, and salvage the track and other equipment, and also negotiate a voluntary agreement for interim trail use.[13] If the parties are unable to reach a trail use agreement, the CITU or NITU automatically converts into an effective certificate or notice of abandonment. If the parties reach a trail use agreement, the CITU or NITU automatically authorizes the interim trail use. The interim trail use is subject to future reactivation of the right-of-way for rail service.[14]

The Board determined on multiple occasions that its role in implementing the Trails Act provisions is ministerial and such determination has been judicially confirmed.[15] The Board has no power to compel a conversion between unwilling parties, and conversely, no discretion to refuse one if voluntarily negotiated. [16] The Board also does not determine whether rail banking and interim trail use is desirable for a particular

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[12] The railroad's reply is due within 10 days after the Board issues a Notice of Findings in a regulated abandonment proceeding and within 10 days after the interim trail use request is filed in an exemption proceeding. 49 C.F.R. § 1152.29 (b) (5).

[13] 49 C.F.R. §§1152.29 (c)-(d). The 180-day period may be extended by voluntary agreement. *Birt v. STB*, 90 F. 3d 580, 588-90 (D.C. Cir. 1996).

[14] 49 C.F.R. §1152.29(c)-(d).

[15] See *Rail Abandonments –Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591 (1986); *Policy Statement on Rails-to-Trails Conversions*, 1990 WL 287255 (I.C.C.) *3 (February 6, 1990); *Nat'l Wildlife Federation v. Interstate Commerce Comm'n*, 850 F. 2d 694, 698-702 (D.C. Cir. 1988) ("*Nat'l Wildlife*"); *Citizens Against Rails-to-Trails v. STB*, 267 F. 3d 1144, 1149-50 (D.C. Cir 2001) ("*CART*").

[16] See, e.g., Docket No. AB-167 (Sub-No. 1094)A, *Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY* (June 10, 2005), slip op. at 6-7("*Chelsea*"); *Iowa Southern R. Co.—Exemption-Abandonment*, 5 I.C.C. 2d 496, 504 (1989) ("*Iowa Southern*"), *aff'd sub nom, Goos v I.C.C.*., 911 F.2d 1283, 1293-1296 (8th Cir. 1990) ("*Goos*"); *Nat'l Wildlife*, supra;); *Washington State Dept. of Game, v ICC*, 829 F. 2d 877, 881-882 (9th Cir. 1987).

line,[17] nor rule on whether a private organization that has filed a statement of willingness to assume financial and managerial responsibility for a right-of-way for interim trail use is "fit" to serve as a trail sponsor.[18] The Board also does not analyze, approve, or set the terms of the interim trail use arrangement or regulate activities over the trail (which are generally subject to state law).[19] After a voluntary trail use agreement is reached, the Board has authority to revoke a trail condition only if it is shown that the Trails Act statutory requirements (the rail banking, liability, and trail management obligations) are not being met.[20] As required under the Trails Act, an interim trail use arrangement is subject to being cut off at any time by the reinstitution of rail service.[21]

Discussion

In its Notice, the Board solicited comment concerning specific issues surrounding the rail banking program that it intended to explore at the July 8, 2009 public hearing.

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[17] See, e.g., *Iowa Southern*, 5 I.C.C. 2d at 504 ("We lack any discretion to decide whether rail banking and use of the right-of-way as a trail is desirable for a particular line; Congress has made that determination...."); *Chelsea*, slip op. at 6.

[18] The Board leaves the fitness issue to the judgment of the rail carrier whose economic interests are at stake and applies a rebuttable presumption that carrier willingness to enter into a trail use agreement is sufficient proof of a trail sponsor's fitness. See, e.g., *Jost v. ICC*, 194 F.3d 79 (D.C. Cir. 1999); *Policy Statement on Rails-to-Trails Conversions*, 1990 WL 287255 (I.C.C.) *3.

[19] See *Policy Statement on Rails-to-Trails Conversions*, 1990 WL 287255 *3; Docket No. AB-389 (Sub-No. 1X), *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.—Abandonment and Continuance Exemption—Between Albany and Dawson, In Terrell, Lee, and Dougherty Counties, GA* (served May 16, 2003) ("*Georgia Great Southern*"), 6 S.T.B. 902, 906-908 (2003); *Chelsea*, slip op. at 6-7.

[20] 49 C.F.R. 1152.29 (a) (3); See *Rail Abandonments –Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591 (1986); *Georgia Great Southern*, supra, 6 S.T.B. at 907. If a trail sponsor intends to terminate interim trail use it must request that the CITU/NITU be vacated on a specified date. 49 C.F.R. §§ 1152.29 (c) (2), (d) (2). The railroad, if it does not wish to reinstate service (or continue to retain the line for future use), may then petition to reopen the abandonment or exemption proceeding and obtain full abandonment authority. Interim trail use arrangements are also subject to substitution of trail sponsors. 49 C.F.R. §1152.29(f).

[21] See, e.g., *Georgia Great Southern*, supra, 6 S.T.B. at 906 ("If and when the railroad wishes to restore rail service on all or part of its property, it has the right to do so, and the trail user must step aside."); *Birt v STB*, 90 F. 3d at 583. With the consent of the original abandoning carrier, the right to reinstitute service (along with the abandoning carrier's residual common carrier obligation over the right-of-way) may be transferred to a third party subject to Board approval of the transfer of operating authority. *See Iowa Power, Inc.—Construction Exemption—Council Bluffs, IA*, 8 I.C.C. 2d 858 (1990); AB -3 (Sub-No. 104X), *Missouri Pacific Railroad Company—Abandonment Exemption—In Muskogee, McIntosh and Haskell Counties, OK* (May 11, 2009), slip op. at 1); *N&W-Aban. St. Mary's & Minister in Auglaize County, OH*, 9 I.C.C. 2d 1015, 1018-1019 (1993) ("*N&W*"). The abandoning carrier may also withdraw from a CITU/NITU should it wish to consummate the abandonment. See *N&W* at 1019.

The AAR's comments on the specific questions raised by the Board, to the extent it is able to provide useful comment on a specific issue, are set forth below.

Board Question:

"Has rail banking under Section 8(d) been a success for rail carriers and trail users?"

AAR Response:

The AAR believes that the rail banking program under Section 8(d) as administered by the Board has been a success for both rail carriers and trail users and effectively serves to further the two declared policies of Congress in enacting the program: (1) promoting the preservation of unused railroad rights-of-way that would otherwise be abandoned for possible future railroad use and (2) promoting trail use in the interim.

The program enjoys the support of railroads because it provides a carrier with a potentially useful, long-term option to abandonment that it did not have previously while concomitantly providing the carrier an incentive to participate voluntarily in the public recreational trails program. Prior to the enactment of section 8 (d), in those circumstances where a carrier determined that a particular rail corridor was not necessary for continued rail service for the foreseeable future and that continued retention and operation of the line would be a financial burden on its overall network operations, the only options (absent the prospect of sale to a third party for continued rail use) were to seek agency approval for discontinuance of service or full abandonment. Where the prospect of future need for the right-of-way for reinstitution of rail service was deemed unlikely (and no offers of financial assistance to subsidize continued rail operations were forthcoming

under the statutory scheme)[22] abandonment was often the only real financial option to the carrier because under discontinuance the carrier would continue to incur financial, managerial and legal responsibility for the right-of-way. Abandonment also allowed the carrier to sell whatever interests it had in the property and use the proceeds for its infrastructure and operations needs. However, abandonment often meant that through exercise of reversionary rights or sale, a rail corridor that may have taken the carrier decades to assemble would essentially be irrevocably lost to the rail network.

Under the rail banking program, a carrier has the additional option in an abandonment or exemption proceeding of effectively discontinuing service over a right-of-way without financial or managerial obligation for an indefinite period by transferring the right-of-way to a trail sponsor for interim trail use. Under this option, moreover, where the carrier has only an easement over the right-of-way, use of the rail banking program rather than abandonment preserves the rail corridor for possible future rail use by the carrier (or a third party with the carrier's consent) by preventing its reversion under state law.[23]

Carrier participation in the rail banking program is also facilitated by the Board's implementation of the program. The Board's procedural regulations are straightforward and the AAR does not believe the regulations impose unreasonable information or paperwork burdens on the parties. The Board has also effectively carried out its essentially ministerial role in administering the program by leaving the negotiation and terms of interim trail use agreements to the involved parties and facilitating the

[22] See 49 U.S.C. § 10906 (offers of financial assistance to avoid abandonment and discontinuance).
[23] See *Presault*, 494 U.S. at 8 (noting, with respect to section 8 (d), that "By deeming interim trail use to be like discontinuance [of operations] rather than abandonment....Congress prevented property interests from reverting under state law....."

negotiation process by its willingness to extend negotiating periods as necessary where the parties agree.[24] The AAR submits that the success of the rail banking program is demonstrated by its widespread use by carriers and trail sponsors[25] and that it has in fact operated as intended to preserve for possible future rail use corridors that would have otherwise been abandoned.[26]

It must be emphasized, of course, that the rail banking program is voluntary and has both benefits and burdens to carriers. A carrier, if it owns the right-of-way and agrees to enter into an interim trail use agreement, foregoes its option to immediately dispose of the property after abandonment is consummated and use the proceeds for infrastructure or operations needs. Moreover, even where the carrier has only an easement in the right-of-way, the carrier must evaluate the financial and managerial qualifications of a proposed trail sponsor and the terms of a proposed interim trail use arrangement before agreeing to interim trail use to protect its continuing interests and any residual common carrier responsibilities in the right-of-way. In short, although the AAR fully supports the rail banking program and its members are active participants, it is with the proviso that a carrier must be able to carefully weigh the benefits and burdens of an interim trail use

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[24] See, e.g., STB Docket No. AB-33 (Sub-No. 255), *Union Pacific Railroad Company---Abandonment—In Carver and Scott Counties, MN* (served June 9, 2009)

[25] See Rails-to-Trails Conservancy (RTC)website, Rail-Trail Statistics (http://www.railstotrails org) (RTC calculates that as of February 2009 there are 1,534 open rail-trails for a total of 15,346 miles and 789 rail-trail projects in process for a total of 9,501 miles.) Moreover, many of the trails created serve valuable public purposes in providing bicycle, hiking and other recreational opportunities to surrounding populations, including transforming rights-of-way into spectacular urban parks. See, e.g., *Chelsea,* supra (former Conrail Highline acquired by CSXT in Chelsea area of Manhattan converted to elevated urban park).

[26] In its Notice (at 2), the Board notes that to date it has authorized nine rail banked lines for restoration of rail service. See, e.g., *Georgia Great Southern,* supra; *Iowa Power, Inc.—Construction Exemption—Council Bluffs, IA*, 8 I.C.C. 2d 858 (1990); AB -3 (Sub-No. 104X), *Missouri Pacific Railroad Company—Abandonment Exemption—In Muskogee, McIntosh and Haskell Counties, OK* (May 11, 2009); *N&W-Aban. St. Mary's & Minister in Auglaize County, OH*, 9 I.C.C. 2d 1015 (1993).

option on a case-by-case basis before agreeing to enter into an interim trail use agreement with a trail sponsor.

Board Question:

"Have most rail corridors proposed for rail banking under Section (8) actually been developed into trails?"

AAR Response:

The AAR does not have specific information regarding the percentage of rail corridors proposed for rail banking that have actually been developed into trails. Under the rail banking program, there is no specific period in which a trail sponsor must develop a rail corridor designated in a CITU/NITU for interim trail use, and some rails-to-trails conversions may take significant time to organize and implement. From the information provided by the Rails-to-Trails Conservancy (RTC), however, it appears that a significant amount of rails-to-trails conversions have occurred. RTC calculates that (as of February 2009) there are 1,534 open rail-trails for a total of 15, 346 miles and 789 ongoing rail-trail projects for a total of 9,501 miles.[27]

Board Question:

"Should the Board require notice or copy of the Trails Act agreements to be submitted to the Board?"

AAR Response:

As the Board notes, it does not presently require notice by the parties that an agreement for interim trail use has been reached as a result of issuance of a CITU/NITU. The Board leaves it to the abandoning carrier to file a notice of consummation of abandonment where no agreement under the CITU/NITU has been reached and the

[27] See Rails-to-Trails Conservancy (RTC) website, Rail-Trail Statistics (http://www.railstotrails.org).

carrier wishes to consummate the abandonment.[28] The Board also does not require that a copy of the Trails Act agreement be submitted to the agency.

The AAR would not object to a requirement that a carrier provide the Board notice when it has entered into an interim trails use agreement under the rail banking program should the Board deem such notice useful in monitoring the progress of the program or the current status of the CITU/NITU.

The AAR, however, would strongly object to any requirement that a copy of the Trails Act agreement be submitted to the Board. As the Board has recognized, its role in implementing the Trails Act is ministerial and interim trail use agreements between carriers and trail sponsors are private agreements that fall outside the jurisdiction of the Board.[29] The Board does not participate in the negotiation of Trails Act agreements, does not approve or interpret the terms of Trails Act agreements, does not regulate activities over the trail or the condition of the trail,[30] and accordingly has no apparent need to collect, publish or otherwise publicly disseminate such agreements.

Moreover, Trails Act agreements, as private agreements, are privately negotiated between the parties and may contain specific conditions or concessions by carriers or trail

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[28] Under 49 C.F.R. § 1152.29 (e) (2) the Board requires that a railroad that has received authority from the Board to abandon a line in a regulated abandonment or exemption proceeding file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. The notice of consummation must be filed within one year of the decision permitting the abandonment where there are no legal or regulatory barriers to consummation (such as Trails Act conditions). If the railroad fails to do so, the authority to abandon expires. If, there are outstanding Trails Act conditions (i.e. issuance of a CITU/NITU) at the end of the one-year time period, the notice of consummation must be filed "within 60 days after satisfaction, expiration or removal of the legal or regulatory barrier." Once the carrier files a notice of consummation, Board jurisdiction over the abandoned right-of-way terminates. See *Birt*, supra.

[29] See, e.g. *Georgia Great Southern*, supra, 6 S.T.B. at 907 ("[W]e play no part in the parties' negotiations. Nor do we analyze, approve, set the terms of—or even require that parties submit to us—their trail use agreements.... Rather, the terms of these agreements are a private contractual matter that is beyond the purview of our limited Trails Act authority [citations omitted]."

[30] Id. at 5-6 (further noting that review and interpretation of Trails Act agreements are issues for the courts to address).

sponsors that may not be generally offered in other Trails Act negotiations. As such, the specific terms of Trails Act agreements may be commercially sensitive and should enjoy the same protection from public filing and dissemination accorded to other private contracts in the absence of the parties' willingness or need to make the terms public.

Indeed, one of the strengths of the rail banking program as administered by the Board is that it is intended to facilitate the voluntary negotiation of Trails Act agreements by leaving the negotiations and terms of agreements entirely to the parties and by eliminating unnecessary regulatory burdens. Any Board requirement that the parties submit Trails Act agreements to the Board would be contrary to the Board's role under the Trails Act, would serve no useful regulatory purpose, and could complicate the negotiation process.

Board Question:

"What can or should the Board do to further facilitate rail banking and encourage the restoration of active rail service on rail banked lines?"

AAR Response:

The AAR believes that the Board's current regulations serve to facilitate rail banking and should be kept in place. The rules impose minimal procedural burdens on the parties and are designed to encourage the voluntary negotiation of interim trail use agreements by making the negotiation process as simple as possible. The rules also ensure that the parties are able to negotiate the agreements under their own terms free from regulatory interference. The Board's willingness to extend the negotiating period at the parties' joint request also serves to facilitate the rail banking program.

The only suggestion for improvement in the rail banking program that the AAR would propose is that the Board, in facilitating the program, informally encourage, but

not require, the parties to anticipate and adequately address in their interim trail use agreements issues that are likely to arise during the course of the agreement so that potential problems are avoided at the outset. For example, one such potential issue that should be addressed in the agreement is whether and what amount of compensation, if any, would be due from a carrier to an interim trail sponsor (or from an interim trail sponsor to a carrier pertaining to restoration costs) as a result of the carrier exercising its right to reactivate rail service.[31] Addressing issues in the agreement pertaining to potential reactivation of service would also facilitate reinstitution of service on the line (where otherwise economically warranted) by eliminating any disincentives arising from uncertainty of liability under the terms of the interim trails agreement.

The AAR also notes that in certain instances, rail carriers may face local or community opposition to the restoration of rail-banked lines to active service. As the Board recognizes, these lines remain part of the national transportation system and are subject to the Board's jurisdiction.

Board Question:

"Who should bear the cost to restore a rail corridor for rail service, including replacing any bridges that may have been removed during interim trail use?"

AAR Response:

As discussed above, the AAR believes that compensation issues pertaining to reactivation of rail service (including responsibility for restoration costs) should be specifically addressed by the parties in their interim trail use agreements. In the absence of specific terms in the agreement, the AAR would consider that the party proposing to

[31] See, e.g., *Georgia Great Southern*, supra. As noted infra at fn. 21, an interim trail use arrangement is subject to being cut off at any time by the reinstitution of rail service.

reactivate rail service should bear the costs (assuming there are no special considerations arising under the terms of the agreement).

The Board also solicited comment "on the future of rail banking in an era of constrained infrastructure." Notice at 2. The AAR submits that, so long as the future holds financial and regulatory uncertainties and risks for any particular industry, business, route of commerce, or pattern of international trade, the rail banking program will continue to serve a useful purpose. The two declared policies of Congress in enacting the rail banking program are: (1) promoting the preservation of unused railroad rights-of-way that would otherwise be abandoned for possible future railroad use and (2) promoting trail use in the interim. The AAR believes that those long-term policies are as valid now as when Congress enacted the Trails Act provisions.